No. 21153

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS SANDERS, *et al.*,

Appellants,

vs.

JOHN ERRECA, *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California Central Division.

APPELLEES' BRIEF.

HARRY S. FENTON,
Chief Counsel,
R. B. PEGRAM,
Deputy Chief Counsel,
JOSEPH A. MONTOYA,
RICHARD L. FRANCK,
ANTHONY J. RUFFOLO,
RONALD L. JOHNSON,
3540 Wilshire Boulevard,
Suite 1100,
Los Angeles, Calif. 90005,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Statutes

Textbooks

No. 21153

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS SANDERS, *et al.*,

Appellants,

vs.

JOHN ERRECA, *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California Central Division.

APPELLEES' BRIEF.

Introductory Statement.

This case is an attempt by the Appellants to show the deprivation of a federally protected property right by state officers acting in their official capacities for the California Highway Commission (hereinafter referred to as the Commission) and the California Department of Public Works (hereinafter referred to as the Department). They claim that Appellees, individually, engaged in acts preliminary to the filing of a condemnation action which allegedly prevented Appellants from converting an old shopping center to a new one on their property.

These acts are briefly described as: a representation that Appellants' property was needed for freeway construction and that litigation would be commenced if de-

velopment to the new shopping center continued; the passage of a condemnation resolution by the Commission; and the failure to promptly institute a condemnation suit by the Department. In fact, a condemnation suit was filed while this action was pending in the District Court based on an amendment to the original resolution authorizing a reduction in the size of the Appellants' property required for the freeway due to a change in its design.

Appellees contend that the reduction in the size of the property to be taken, the threats of litigation—both verbal and written (resolution), and the delay in prosecuting the litigation do not amount to a deprivation of a property right guaranteed by the United States Constitution, and further that the alleged acts attributable to Appellees as members of the Commission were done in the exercise of a discretionary function for which they are immune.

Restatement of the Case.

Appellants have summarized the factual allegations contained in the Amended Complaint and the assertions in support of their motion for new trial. (A. B. pp. 2-4.)*

The amended complaint, which was filed after Defendants' motion to dismiss, added paragraph 8 purporting to allege misconduct by Defendant Pedley in failing to acquire the property promptly and misconduct by Defendant Erreca for failing to take good faith steps to acquire the property. [C. T. p. 32.]

---

*A. B. designates Appellants' Opening Brief; C. T.—Clerk's Transcript; R. T.—Reporter's Transcript.

Appellants admitted that no misconduct was alleged as to Defendant Erreca in the original complaint and sought to impose liability on him through paragraph 8 of the Amended Complaint. Reading the amended complaint and Affidavit of Leon Groode together, the following is alleged to have transpired.

Appellants while in the process of converting their old shopping center to a new one were informed that their property would be taken for a freeway and were requested to cease further development. Appellants were also informed that if development did not stop litigation would be commenced to prevent development. If development was not continued Appellants were informed that their property would be appraised and acquired within six months. [C. T. p. 180.] The above conversations took place on March 30, 1965.

The Highway Commission passed the condemnation resolution on May 26, 1965 less than two months after the above discussion. A cloud on title is alleged as a result thereof.

Approximately six months after the discussion with Appellants or sometime in September, 1965, they were informed that the taking was to be reduced to a partial acquisition rather than a total, and that another one-half year would be required to reappraise the property and obtain another condemnation resolution. [C. T. pp. 180-181.]

The amending resolution authorizing a partial take due to a design change was passed on February 16, 1966 [C. T. p. 143] and a condemnation action was commenced on March 7, 1966. [C. T. p. 145.]

Appellants further allege that by reason of the above acts "plaintiffs' property has effectively been taken" and "without making any compensation" defendants under color of state law have subjected plaintiffs to the deprivation of "rights secured by the United States Constitution and laws, that plaintiffs' property not be taken, except for public use and then only upon payment of just compensation." [C. T. pp. 32-33.]

Appellants' motion for new trial on the grounds of newly discovered evidence (amended resolution and magazine article) was denied for lack of sufficiency and lack of diligence. [C. T. p. 199.]

Questions Presented.

1. Do threats of litigation including the passage of a condemnation resolution, and delay in prosecuting litigation amount to the deprivation of a property right guaranteed by the 14th Amendment to the Constitution?

2. Are members of the State Highway Commission immune from civil liability in the exercise of their discretionary duty in passing condemnation resolutions?

ARGUMENT.

Summary.

Appellees do not arrogate to themselves the divine right of kings or sovereign immunity. Nor was any attack made upon the federal supremacy clause in the court below and none is advanced here. Finally, no claim is made that a state employee is immune because he works for the state. These were not issues before the trial court and no useful purpose would be served by responding to that part of Appellants' brief devoted thereto.

The issues in this case are narrow: has plaintiff been deprived of a property right; and are the commissioners who exercise a discretionary function delegated to them by the legislature immune? Though narrow, these issues involve profound questions dealing with real property rights as defined by the courts, and federal-state relationships.

The interpretation of deprivation which Appellants seek is vague and uncertain covering a multitude of "sins" not within the scope of the Constitution. Their argument is akin to Specification of Errors 4 (A. B. p. 6) wherein taking and damaging are distinguished from deprivation of a property right — a distinction without a difference.

Appellants also request this court to impose liability on the commissioners predicated on the simple assertion of "bad faith" and to ignore that delicate federal-state harmony based on the traditional view that certain state officers should not be required to defend purely discretionary acts. If such a request is granted the harassment of these officials would be unlimited consid-

ering only the countless number of resolutions needed in this freeway oriented society.

What appellants complain of here is that threats of litigation and the delay in the process of eminent domain have done them harm. Nowhere in the complaint, however, do they relate these acts to the deprivation of a property right. The claim that their property was taken without compensation is an erroneous legal conclusion and was properly denied by the trial court.

I.

Appellants Have Not Alleged the Deprivation of a Right Secured by the Constitution to Permit Recovery Under the Civil Rights Act.

The protections of the 5th and 14th Amendments guaranty the same rights (*Appleby v. Buffalo* (1911), 221 U.S. 524, 31 S. Ct. 699, 55 L. Ed. 838), *i.e.*, "nor shall private property be taken for a public use, without just compensation."

The Civil Rights Act (28 U.S.C. 1983) grants jurisdiction to the Federal Courts only where there has been a deprivation of a constitutionally guaranteed right. *O'Connor v. O'Connor* (1963), 315 F. 2d 420.

Because of the various acts alleged, the sundry rights disturbed, and the varied roles of the defendants, this portion of the argument is divided in three parts. The acts analyzed individually or as a course of conduct lead to the same result — that no claim is stated. The acts and the rights they are claimed to impair are as follows:

a. The passage of the condemnation resolution as a cloud on title.

b. The threats of Defendant Pedley as an impairment of use; and

c. The reduction in size and delay in filing suit as a loss in value.

A. The Passage of a Resolution Authorizing the Acquisition of Property by Eminent Domain Is Not a Cloud on Title as a Matter of Law.

Appellants' complaint and argument misconceive the legal effect of a condemnation resolution. It does not as claimed affect the owner's rights under state or federal law.

In *Silva v. San Francisco* (1948), 87 Cal. App. 2d 784 the owner sought declaratory relief by way of inverse condemnation claiming that condemnation proceedings had been authorized by the city's resolution but that no suit had been filed to implement the authorization. He sought to have the value of his property frozen to protect him from harm from fluctuations in the market. The court's comment on the effect of the resolution is:

> "In the present case there has been no taking of the land—no entry or physical interference with plaintiff's property. Compensation is not payable until there is a 'taking' or progress in the contemplated improvement. . . ." (pp. 787-788.)

The federal courts have also held that enabling legislation or authorization to condemn is not a taking within the framework of federal eminent domain procedure. In *23 Tracts of Land v. U.S.* (1949), 177 F. 2d 967 it was stated at page 969:

> "The claim for compensation to which a landowner is entitled for the taking of his property

> by governmental authority arises at the time of the taking. The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property."

Nor does the passage of a condemnation resolution deprive an owner of rights under the Civil Rights Act. *Robinette v. Chicago Land Clearance Commission* (1951), 115 Fed. Supp. 669 involved a claim by the owners that the resolution passed by the commission threatened the value of their property in violation of the Civil Rights Act of 1871. The court observed at page 672:

> ". . . it should be noted that such administrative action is merely a preliminary step in the process of exercising the power of eminent domain. No property is taken in the proceeding, *nor are the property rights of the landowners affected in any manner.*" (Emphasis added.)

The law is clearly expressed by both federal and state decisions: no cloud on title is created by passage of the condemnation resolution, and no property rights are violated. The Appellants' conclusion that the resolution created a cloud is wrong as a matter of law.

The fatal defect in Appellants' argument is pointed out in *Devine v. Los Angeles* (1906), 26 S. Ct. 652, 202 U.S. 313, 50 L. Ed. 1046 where the owner sought to remove under the authority of the Civil Rights Act an alleged cloud on the title of his property.

> "The test as to when a cloud is or is not cast, as stated by Mr. Justice Field, then chief justice of California, in *Pixley v. Huggins,* 15 Cal. 127, and

> reasserted in *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. Ed. 231, is undoubtedly applicable and demonstrates that the assertion of unconstitutionality cannot be resorted to to maintain federal jurisdiction as constituting a cloud. The averment of unconstitutionality is a mere pretext to obtain that jurisdiction." (202 U.S. 335, 50 L. Ed. 1054.)

So, too, in the case at bar Appellants assert unconstitutionality to obtain jurisdiction, but fail to allege even with the overworked phrase "passed in bad faith" a cloud on their title.

B. The Verbal Threats of Litigation Alleged Against Defendant Pedley Do Not Constitute a Violation of Constitutional Rights.

Appellants state (A. B. p. 37) that "any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional amendment (5th)." This is a correct statement of the law from Nichols on Eminent Domain but is incomplete. The text goes on (2 Nichols, Eminent Domain 6.1 [1] to state at pages 369-371:

> "It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, *which right or privilege is destroyed, injured or abridged by such appropriation.*" (Emphasis added.)

and continues at page 373:

> "A mere declaration of an intention to take, *or even a threat to take*, cannot constitute a taking under the fifth amendment. And it has been held that, though the facts may constitute a tort, an unintentional taking will not constitute an appropria-

> tion within the meaning of the constitutional amendment dealing with the appropriation of property to a public use." (Emphasis added.)

Defendant Pedley's alleged threat to take action occurred prior to the resolution and thereby was claimed fraudulent. By reason of this act, states the complaint, "Plaintiffs' property has effectively been taken, by depriving plaintiffs of their right and opportunity to use, develop, lease and encumber the subject property." [C. T. p. 32.]

A similar legal conclusion was rejected by *Hamer v. State Highway Commission* (1957), 304 S.W. 2d 869. There the commission proposed to construct a highway across land the owner was developing to a subdivision, and on the direction by commission agents not to develop the part needed for the right of way, the owner redesigned his entire plan. The highway location was changed and no land was taken from the plaintiff, who had withheld a portion of his land from the subdivision relying on the representation.

The Supreme Court of Missouri stated the issue at page 871:

> "We have the sole question of whether the above acts constitute a taking or damaging of plaintiff's property within the meaning of Art. I S. 26, Constitution of Missouri, 1945, which in part here material, provides 'that private property shall not be taken or damaged for public use without just compensation.' "

And held at page 872:

> "Also, it has properly been held that the serving or giving of notice of intention to condemn, . . . the

> actual filing of the condemnation petition, . . . the passing of ordinances and resolutions authorizing the condemnation, . . . and the negotiation with the owner for the purchaser of the land needed for a public improvement, . . . do not of themselves constitute the taking or damaging of property in the constitutional sense. In none of these situations is there a physical taking *or any invasion or appropriation of any right of the owner to the use of his property.*" (Emphasis added.)

An analagous situation developed in California in the case of *Hilltop Properties v. State* (1965), 233 Cal. App. 2d 349 involving an appeal from an order sustaining defendant's demurrer to the complaint. The District Court of Appeal characterizes the owner's claim as follows at page 354:

> "Although pleaded somewhat ineptly, it is apparent that the theory of this cause of action is that subject parcels were taken for public use when they were caused to be withheld from the development of the larger parcel at the instance and request of defendant pending negotiations for their acquisition."

And disposed of the plaintiff's theory in the following manner at page 361:

> "We are satisfied that in light of the foregoing principles plaintiff has not alleged any facts from which it can reasonably be inferred that defendant has in any way *invaded, appropriated, or interfered with plaintiff's use or enjoyment.*" (Emphasis added.)

The court did, however, point out that recovery might be allowed on the non-constitutional ground of estoppel where exceptional circumstances could be shown.

Threats by defendant Pedley to compel the Appellants to withhold development of the subject property pending negotiations do not invade or interfere with their use of the property under the above authorities. Like the verbal assertions of ownership by City officials in *Devine v. Los Angeles, supra*, the Civil Rights Act does not protect against such conduct. (202 U.S. 337, 50 L. Ed. 1054.) The reason for such a rule is obvious. Nothing is taken from the owner. If nothing is taken there is no violation of the 5th and 14th Amendments, and no claim exists under Section 1983 of the Civil Rights Act.

Progress Development Co. v. Mitchell (1961), 286 F. 2d 222 is relied on heavily by Appellants (A. B. pp. 19, 26-27) and was argued with equal vigor to the trial court. The case is clearly distinguishable. There certain village officials including the local park commissioners were engaged in a conspiracy to prevent the plaintiffs from developing land into an integrated community based on a pre-announced formula. Permits for development were denied and the village commenced condemnation proceedings not for the purpose stated, a park, but to prevent plaintiff from carrying out its announced scheme. Here public use is conceded. (A. B. p. 24.) In *Mitchell* the public purpose was a pretext to take the plaintiff's land and thereby to prevent it from doing business in a certain manner.

No such conduct is alleged here. While preliminary steps in the acquisition of Appellants' land were initiated, they did not operate to take the land or to de-

prive them of its use. The heart of the case as argued by Appellants' counsel [R. T. pp. 18-19] is that but for the statements of Defendant Pedley there would have been a shopping center on the property at the time of issuance of summons—since there is no new shopping center improvement the land will be valued without reference to it, and the owner will not receive its value in the state condemnation action when the land is taken. Assuming the tort is alleged does it lead to a constitutional violation? The owners may still receive just compensation based on the value of the land for all of its uses and purposes as though there had been no taking. Their right to compensation has not been affected.

Appellants' novel theory that any state officer is liable under Section 1983 for every tort overlooks the requirement that there must be a clear constitutional violation in order for the federal courts to invoke jurisdiction. *Holt v. Indiana Mfg. Co.* (1899), 176 U.S. 68, 44 L. Ed. 374. None is alleged in the complaint.

C. The Alleged Delay in Acquisition and the Reduction in Size of the Proposed Taking Do Not Deprive Appellants of Any Property Rights Secured by the Constitution.

The original complaint charged Defendant Erreca with bad faith as a member of the commission. [C. T. p. 4.] The amended complaint charges him with acts independently of the commission [C. T. p. 65], in failing "to cause any good faith steps to be taken by the Department of Public Works for the acquisition of the subject property." [C. T. p. 32.] The amended complaint goes on to accuse Defendants Erreca and Pedley with bad faith in causing the acquisition to be delayed.

The delay is alleged to have caused the destruction of the shopping center and the value of the property. In order to support this allegation Appellants relied on a line of cases cited in 31 A.L.R. 370 dealing with needless delay and abandonment of condemnation proceedings.

However, before condemnation proceedings have been commenced negligent or wilful delay in implementing an ordinance authorizing such proceedings does not affect the owner's right to possession and use under the constitutional provision. *Lord Calvert Theatre Inc. v. Baltimore* (1956), 208 Md. 606, 119 A. 2d 415. To the same effect, *Shoemaker v. United States* (1892), 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

In *State v. Beck* (1933), 63 S.W. 2d 814, 92 A.L.R. 373, the city negligently delayed proceedings over a period of ten years and ultimately acquired only a portion of the property originally needed. During the interim the owner claimed damages due to his inability to rent, sell, improve and finance the property.

The Missouri Court analyzed the City's misconduct in the following manner:

> "Respondent in his brief contends: 'Since, therefore, as a result of the institution of the condemnation proceedings and their ultimate partial dismissal, there has been a taking of property or at least a serious damage thereto for public use, the movent below is clearly entitled under the Constitution to compensation therefore'. . . . In the proceeding pending before the respondent there will *not*, as regards damages for pendency and delay of the suit, be a taking of the property *or a damage of the property* as is contemplated by the

> Charter of the City of St. Louis *or the Constitution* of this state that can be determined in a condemnation suit." (92 A.L.R. 378; Emphasis added.)

The above decision is especially noteworthy since it recognized the existence of tortious conduct, but held that the constitution itself did not provide a basis for recovery or compensation for either the wrongful delay or reduced taking.

Also in *Silva v. San Francisco, supra*, there appears to have been a lengthy delay following the resolution prompting the owner to file his unique action. Speaking of the time between the resolution and the filing of suit, the Court comments:

> "Assuming the proper rule to be that compensation in such cases shall accrue at the date of summons there is *no rule called to this court's attention which provides that the government's complaint herein must be filed within a given period.*" (87 Cal. App. 2d p. 788; Emphasis added.)

The statute involved in this situation is California Streets and Highways Code, Section 102, which provides in part:

> "In the name of the people of the State of California the department *may* condemn for state highway purposes, under the provisions of the Code of Civil Procedure relating to eminent domain, any real property or interest therein which it is authorized to acquire. The department shall not commence any such proceeding in eminent domain unless the commission first adopts a resolution declaring that public interest and necessity require the

> acquisition, construction or completion by the State, acting through the department, of the improvement for which the real property or interest therein is required and that the real property or interest therein described in such resolution is necessary for the improvement." (Emphasis added.)

The statute therefore leaves the filing of the action within the discretion of department officials. The timing of the action would necessarily be included within this discretionary function. *County of Mateo v. Coburn* (1900), 130 Cal. 631, 635.

Appellants by the device of imposing liability on state agents seek to have the Federal Courts supervise and control the initiation of condemnation proceedings when such proceedings are not commenced to their satisfaction or whim. The prospect of liability in such a situation would certainly lead to a disruption of the orderly process of the proceedings to acquire property for a public purpose in the state courts.

In fact, under such circumstances the property is valued as though no eminent domain proceedings were pending or likely, so that assuming *arguendo* that there is a loss in value occasioned by the delay it will not affect the owners' constitutional right to just compensation. (*Atchison, Topeka & Santa Fe Ry. Co. v. So. Pac. Co.* (1936), 13 Cal. App. 2d 505, 517-518.)

The same reasoning would apply to the determination to reduce the size of the proposed taking which was alleged as newly discovered evidence. In fact as the court determined, such evidence was not newly discovered, but was known by Appellants' agent in September [C. T. p. 181] or October, 1965 [C. T. pp. 191,

194], several months prior to the commencement of this action.

In any event Appellants claim of a loss in value is specious, since under California law the owner is entitled to severance damages in the case of a partial taking. (*People v. Ricciardi* (1943), 23 Cal. 2d 390, 400.)

II.

Members of the Commission Are Immune From Liability Under the Civil Rights Act When They Are Exercising the Discretionary Function of Adopting Resolutions Delegated by the Legislature.

The commission is created by state statute. (California Streets and Highways Code, Sec. 70.) The ensuing sections grant to the commission the necessary powers to carry out the highway and freeway program within the state, including the power to authorize the department to acquire private property by eminent domain. (California Streets and Highways Code, Secs. 102 and 103.)

> "The practice of delegating to admministrative officers or boards powers which were originally performed directly by the legislature is of long standing and has met the approval of the highest courts in this state as well as in other jurisdictions." *Holloway v. Purcell* (1950), 35 Cal. 2d 220, 231.

The Supreme Court has held that the function of authorizing the condemnation of private property is an exercise of legislative discretion in the following words:

> "The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may either

> be exercised by the Legislature or delegated by it to public officers. . . . *They are legislative questions, no matter who may be charged with their decision.* . . ." (Emphasis added.) *Rindge Co. v. Los Angeles* (1922), 43 S. Ct. 689, 693, 262 U.S. 700, 709, 67 L. Ed. 1186.

Other cases holding that the California Highway Commission performs a discretionary function in passing condemnation resolutions are: *People v. Chevalier* (1959), 52 Cal. 2d 299, 307 and *People v. Olsen* (1930), 109 Cal. App. 523, 531.

The commission, therefore, is acting for the legislature when it authorizes the power of eminent domain. It should enjoy the same immunity when exercising this discretionary power as the legislature. *Francis v. Lyman* (1954), 216 F. 2d 583, 587.

There is no question that a common law immunity for discretionary acts exists under the Civil Rights Act. (*Tenney v. Brandhove* (1951), 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019.)

The courts have generally recognized legislative and other governmental immunities from the thrust of the Civil Rights Act. (*Delaney v. Shobe* (1964), 235 Fed. Supp. 662, 665.) And this Court has also followed the immunity doctrine as an implied limitation on the scope of the Civil Rights Act.

> "No immunity from liability for the proscribed conduct is mentioned in the statute, but courts have engrafted an immunity in favor of certain public officials for acts done in the performance of their traditional official functions. The immunities recognized in these cases are generally

those which were respected at common law. See, e.g. *Tenney v. Brandhove* (state legislator). Among the cases in which the immunity of a judge has been upheld are (Citations). On the other hand certain public officers, such as policemen have been held not to be immune. (Citations) The arguments generally advanced in support of immunity are, '(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceedings are far more appropriate ways to enforce the honesty and efficiency of public officers.' Comment, 66 Harv. L. Rev. 1285, 1295 n. 54 (1953). *That these are important considerations cannot be questioned.*" (Emphasis aded.)

Robichard v. Ronan (1965), 351 F. 2d 533, 535.

Here the Appellants ask that by the conclusion in the pleadings of "bad faith" the commissioners must undergo the risk of a law suit. With the knowledge of the vast scope of the freeway program in this state, and the number of parcels of property necessarily involved, along with the built-in adversary nature of condemnation proceedings, subjecting these public officials to liability on the simple assertion of bad faith would result in harassment beyond contemplation.

It is quite true as Appellants assert that these are only men. To require them to endure the burden of a trial on potentially every resolution simply on the conclusion of the pleader would greatly impair their effectiveness. The trial court properly found that on the basis of the pleadings the commissioners were immune and that they should not be called upon in every case to prove such immunity. [R. T. p. 26, lines 1-4.] The purpose of the rule to protect against harassment would otherwise be obviated.

As the 5th Circuit pointed out in *Norton v. McShane* (1964), 332 F. 2d 855, the court must balance two considerations:

> ". . . the protection of the individual citizen against damage caused by oppressive or malicious action on the part of public officers, and the protection of the public interest by shielding responsible governmental officers *against the harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities.*" (332 F. 2d 857; emphasis added.)

The underlying reason for both legislative immunity and executive immunity appears the same, *i.e.,* to protect the public by insuring that its public officers are free to work efficiently without the constant interference that unlimited liability would exact.

This court has previously held executive officers of the state immune similiar to the immunity granted federal officers in *Hoffman v. Halden* (1959), 268 F.

2d 280. The immunity was determined on the basis of the pleadings, at page 300:

> "Though neither are Civil Rights cases, we are content to follow *O'Campo v. Hardisty,* supra and *Cooper v. O'Connor,* supra, (Internal Revenue Agents) in this case and extend immunity to a state officer for his discretionary acts within the scope of his authority."

California courts follow the common law rule of immunity as demonstrated by the following quote from *Lipman v. Brisbane Elementary School District* (1961), 55 Cal. 2d 224, 229:

> "In *Muskopf v. Corning Hospital District, ante,* p. 211 [11 Cal. Rptr. 89, 359 P. 2d 457], we held that the rule of governmental immunity may no longer be invoked to shield a public body from liability for the torts of its agents who acted in a ministerial capacity. But it does not necessarily follow that a *public body* has no immunity where the discretionary conduct of governmental officials is involved. [1] While, as pointed out in the Muskopf case, a governmental agent is personally liable for torts which he commits when acting in a ministerial capacity, a different situation exists with respect to discretionary conduct. Because of important policy considerations, the rule has become established that government *officials* are *not personally* liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. (*Hardy v. Vial,* 48 Cal. 2d 577, 582-584 [311 P. 2d 494]; *Coverstone v. Davies,* 38 Cal. 2d 315, 322 [239 P.

> 2d 876]; *White v. Towers,* 37 Cal. 2d 727, 730-732 [235 P. 2d 209, 28 A.L.R. 2d 636]; see *Barr v. Matteo,* 360 U.S. 564, 569 et seq. [79 S. Ct. 1335, 3 L. Ed. 2d 1434].) The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation. (*Hardy v. Vial,* 48 Cal. 2d 577, 582-583 [311 P. 2d 494].)" (Emphasis added.)

The policy is the same as that underlying the reason for immunity under the Civil Rights Act. While Appellees do not contend that state law may insulate them from liability, the *Lipman* case is cited for authority on the scope of the common law rule.

The contention that the resolutions passed by the commission are not discretionary is unsound. Both statute and case law declare they are discretionary decisions within the scope of the commission's authority. The magazine article [C. T. pp. 132-135] by Defendant Houghteling alleged as new matter is nothing more than a statement that the commission is overworked, understaffed, and relies to a great extent upon the Division of Highways of the department for its information. Its decisions are no less discretionary because of these common governmental problems.

Appellants again, heavily rely on *Progress Development Co. v. Mitchell* (A.B. pp. 18-19) which states:

> "The common law immunity of state legislators for their acts, . . . does not extend to *local* officials

> charged with administering in a *discriminatory* manner the laws so as to preclude Negroes from moving into an all-white community." (286 F. 2d 231) (Emphasis added.)

Here the officials are not local, but state-wide. The effect of subjecting small town officials to liability is negligible compared to a state commission which conducts the business of the magnitude and responsibility described in the above-mentioned article by Defendant Houghteling. The harassment, hazards and numbers of suits potentially arising from the *Mitchell* ruling are minimal. Here the risk is incalculable.

Udall etc. v. Wisconsin et al. (1962), 306 F. 2d 790 cited by Appellants (A. B. p. 30) is, of course, not to the point. There, unlike here, the statute, itself, imposed no discretionary duty, but merely the application of a mathematical formula. The *Rindge, Chevalier,* and *Olsen* cases have already construed the duty in passing such resolution as discretionary.

Conclusion.

A close analysis of each of the allegations in the complaint reveals that they are fatally defective. The claim that the condemnation resolution encumbers the title is without legal foundation. This alone prevents recovery against the commission members.

Even assuming fraud has been alleged against Defendant Pedley, there was no taking or damaging of the property during negotiations within the meaning of those constitutional terms. Such conduct does not deprive the owner of his rights of use and enjoyment as those rights have been defined by the courts. Failure

to expedite the proceedings charged against Defendant Erreca does not affect the value of the property, nor can it deprive Appellants of their right to just compensation under California law.

Passage of the condemnation resolution to acquire the property for a public use, a freeway, is the exercise of a discretionary duty delegated to the commission by the California Legislature to effectuate that body's highway program. Liability should not attach to such deliberation and determination. To do so would completely ensnarl the commission in constant court defense and deter them from their delegated public function.

For the reasons above stated, it is respectfully submitted that the District Court's order dismissing the action against each and all defendants be affirmed.

Respectfully submitted,

HARRY S. FENTON,
Chief Counsel,

R. B. PEGRAM,
Deputy Chief Counsel,

JOSEPH A. MONTOYA,
RICHARD L. FRANCK,
ANTHONY J. RUFFOLO,
RONALD L. JOHNSON,
By ANTHONY J. RUFFOLO,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ANTHONY J. RUFFOLO